IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO.196/2005

1. Dilip Kumar,
2. Gopal Krishna Rathi,
   Petitioner Nos. 1 & 2 the erstwhile
   Directors of a company known as Geekay
   Exim (I) Ltd., having its office at
   Rahimtoola House, 7 Homji Street,
   Fort, Mumbai 400 001. .... Applicants

VERSUS

1. State of Goa,
2. Mrs. Claire Shroff,
   Indian Inhabitant, residing at Vaga Shium,
   Anna Vado, Chogm Road, Candolim, (Goa). .... Respondents

Shri Manish Bohra, Advocate for the Applicants.
Shri S.N. Sardessai, P.P. For Respondent No.1.
Shri S.D. Lotlikar, Senior Advocate with Ms. K. Sambari, Advocate for Respondent No.2.

CORAM **: N. A. BRITTO, J.**
DATE : **12/12/2005**

ORAL ORDER

Admit. Heard forthwith.

2. The Applicants herein were Accused Nos. 4 & 6 in Cr.C. No.15/97/B filed against them under Section 138 of the Negotiable Instrument Act, 1881. They have invoked the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 to quash and set aside the order dated 16/12/2004 of the learned JMFC, Mapusa and the order dated 19/8/05 of the learned Sessions Judge, Panaji.

3. In the said complaint filed by Respondent no.2 there are as many as 14 Accused, some of whom are yet to be served. The Applicants/A-4 & A-6 on being served with summons filed an application dated 27/11/2003 seeking for the exemption but the said application came to be rejected by order dated 14/11/2004 of the learned JMFC. In rejecting the said application, the learned JMFC observed that compliance under Section 208 of Cr.P.C. was not done and the Accused has not executed personal bonds for their appearance and therefore the Accused can apply for exemption, only after compliance of the aforesaid mandatory provision.

4. The Applicants/A-4 & A-6 preferred a Revision against the said order dated 4/11/2004, being Criminal Revision Application No.116/04 which came to be dismissed on 19/8/05. It appears that the revision application came to be dismissed because the same was not maintainable, the order dated 4/11/04 being an interlocutory order and also because the Advocate appearing on behalf of the Applicant/A-4 & A-6 had neither signed the wakalatnama nor had filed wakalatnama on their behalf. The learned Sessions Judge observed that the application of exemption contained the undertaking which was signed by the Advocate and as such the statement made by the Advocate, 'who had not even filed the wakalatnama' could not be considered to be and undertaking given by the Accused themselves. The learned Sessions Judge also noticed that the

learned JMFC had not held that the Applicants were not entitled for exemption but had directed them to seek exemption after furnishing the bail bonds. The learned Sessions Judge also noticed that earlier on 29/12/2001 warrants were issued against the Applicants/A-4 & A-6 alongwith A-14 and that it is only A-14 who had challenged the said order successfully in Criminal Revision Application No.12/02 and only the warrant issued against him (A-14) was cancelled and that, the Applicants/A-4 & A-6 against whom warrants were issued had neither challenged the order by which warrants were issued against them nor the order rejecting their application for cancellation of warrants nor they had surrendered before the Court, although, subsequently Advocate Shri Bohra appearing on their behalf had sought an exemption, and, exemption was granted from time to time.

5. Shri Bohra, the learned Counsel on behalf of the Applicants/A-4 & A-6 has submitted that the law did not require that the Applicant/Accused have to appear in person first before seeking their exemption and that exemption should have been granted to Applicants/A-4 & A-6 once they sought the same through their Advocate. Shri Bohra has placed reliance on the decision of the Apex Court in the case of ***M/s. Bhaskar Industries Ltd. Versus M/s. Bhiwani Denim & Apparels Ltd. & Ors.*** (JT 2001 7 SC 127) and in the case of ***Mr. Bhaskar Sen Versus State of Maharashtra & Ors.*** (2004(4) ALL MR 606).

6. Admittedly the Applicants/A-4 & A-6 are residents of Mumbai and they could not have attended the Court of the learned JMFC at Mapusa from time to time, without undergoing inconvenience as well as considerable expenses. Although the Hon'ble Supreme Court in ***M/s. Bhaskar Industries Ltd.*** (supra), after considering the provisions of Section 205(2) and Section 317 of the Code has stated that it is within the powers of the Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations to him, and the comparative advantage would be less, such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice.

7. The Supreme Court has stated that in appropriate cases the Magistrate can allow the accused to make even the first appearance through Counsel. The Magistrate is empowered to record plea of accused even when his Counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers

the court to dispense with the personal attendance of the accused (provided he is represented by a Counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a Counsel on his behalf would be present in the court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of witnesses.

8. This Court in the case of ***Mr. Bhaskar Sen Versus State of Maharashtra & Ors.*** (supra) after relying as in the case of ***M/s. Bhaskar Industries Ltd.*** (supra) has issued appropriate directions to the Courts trying summons cases and in particular cases under Section 138 of the Negotiable Instrument Act. I do not think it is necessary to reproduce herein the said 11 directions which are mentioned in para 10 of the learned judgment.

9. Although the order of the learned JMFC dated 4/11/2004 is unsustainable in view of what the Supreme Court has stated in the case of ***M/s. Bhaskar Industries Ltd.*** (supra), the order dated 19/8/2005 of the learned Sessions Judge in Criminal Revision Application No.116/04 cannot

be faulted. If there are warrants issued against the Applicants/A-4 & A-6 by the order of the learned JMFC dated 29/12/2001 than there is no question of any exemption having been granted to the Applicants as long as the said order had remained in force. It does appear that inspite of the said order dated 29/12/2001 the learned JMFC knowingly or otherwise did show some indulgence to the Applicants and granted exemption to the Applicants from time to time. The Judgment/Order of the learned Sessions Judge dated 19/8/2005 also shows that the Advocate appearing on behalf of the Accused did not have a wakalatnama duly signed by the Applicants in his favour nor the Advocate appearing on their behalf had signed wakalatnama which was on record and therefore it is obvious that the Applicants/A-4 and A-6 had not complied with the prerequisites of granting exemption as set out by the Supreme Court in the Case of ***M/s. Bhaskar Industries Ltd.***(supra). Therefore in this view of the matter no fault could be found with the order of the learned Sessions Judge dated 19/8/2005.

10. Although the Hon'ble Supreme Court has stated in ***M/s. Bhaskar Industries Ltd.*** (supra) that an Accused may make an application to a Magistrate through his duly authorised Counsel praying for affording the benefit of his personal presence being dispensed with, in my view, it is desirable that any such application filed by the Accused for his exemption should be signed by the Accused himself, so that the

undertaking which the Accused gives to the Court that (a) he would not dispute his identity, that (b) a Counsel will appear for him and that (c)he would have no objection in taking evidence in his absence become more meaningful. It is not unknown that in many a times the accused change their advocates mid trial and in such an event it would be possible for an accused to turn round and say that he had not authorised his advocate to give such an undertaking thereby putting the Complaint into innumerable hardships. If such an application for exemption is filed there would be no need to insist that the Accused executes a bail bond before he appears, before the Court. Since the Applicants/A-4 & A-6 had not complied the basic prerequisites for granting of exemption as laid down by the Supreme Court in the case of ***M/s. Bhaskar Industries Ltd.***(supra) and since the Advocate appearing on their behalf had not even filed a wakalatnama, I find that there is no case made out by the Applicants/Accused for my interference in extraordinary jurisdiction under Section 482 of the Code. Consequently the application is hereby dismissed.

N. A. BRITTO, J.

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